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STATE OF WASHINGTON

No. 79209-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

GENE CHAMPAGNE, CARY BROWN, ROLAND KNORR,  
and CHRISTOPHER SCANLON, Petitioners,

v.

THURSTON COUNTY, Respondent.

REPLY IN SUPPORT OF  
PETITION FOR REVIEW

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION .....	1
II. SUMMARY OF REPLY TO DEFENDANT’S ANSWER.....	1
III. REPLY TO DEFENDANT’S ANSWER.....	3
A. Plaintiffs Have Stated an Actionable Claim Under the Respective Wage and Hour Statutes. ....	3
1. Petitioners’ Complaint Seeks Civil Remedies Available Under the Minimum Wage Act and Wage Payment Act. ....	4
2. Petitioners’ Statutory Claims Were Improperly Dismissed. ....	6
B. The Agency’s 2007 Amendments to WAC 296-128-035 Should Not Be Given Retroactive Effect .....	10
IV. CONCLUSION .....	14

## TABLE OF AUTHORITIES

### Cases

<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 (1977).....	5
<i>Letourneau v. State, Dept. of Licensing</i> , 131 Wn. App. 657, 128 P.3d 647 (2006).....	12
<i>Magula v. Benton Franklin Title Co.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	12
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998) 2	
<i>Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000) .....	7, 8

### Statutes

RCW 49.46.090 .....	6, 8
RCW 49.46.130 .....	7
RCW 49.48.010 .....	6, 10
RCW 49.48.040 .....	11
RCW 49.52.070 .....	3, 4, 5, 6

### Regulations

WAC 296-128-035 .....	passim
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## **I. INTRODUCTION**

Petitioners Gene Champagne, Cary Brown, Roland Knorr, and Christopher Scanlon, corrections officers for the Thurston County Sheriff's Office in Thurston County, Washington, submit this Reply in support of their Petition for Review filed with this Court on September 8, 2006. For the reasons set forth below and in their opening brief, Petitioners request that this Court reject the arguments of Defendant-Respondent Thurston County, accept review of the August 8, 2006 decision of the Court of Appeals, and reverse for further proceedings.

## **II. SUMMARY OF REPLY TO DEFENDANT'S ANSWER**

In response to the Petition for Review, Defendant-Respondent Thurston County ("Defendant") makes two basic arguments why review should not be accepted. First, Defendant argues that the Court of Appeals correctly found that Washington law provides no statutory remedy for the delayed payment of overtime wages. Second, Defendant asserts that recent agency revisions to the regulation underlying Petitioners' statutory claims, WAC 296-128-035, absolve Defendant from any liability associated with its payroll practices. Based on the combination of these arguments, Defendant asserts that there is no basis for this Court to grant review, as there is no pending issue of substantial public importance.

For the reasons discussed below, Petitioners' believe that Defendant's first argument misstates the claims at issue in this suit and

ignores not only the statutory remedies giving rise to Petitioners' claims, but also Washington's "strong policy in favor of payment of wages due employees." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998). Petitioners' statutory claims are well-grounded in Washington law. The civil enforcement provisions in both the Washington Minimum Wage Act, RCW Ch. 49.46, Wage Payment Act, RCW Ch. 49.48, as well as the Wage Rebate Act, RCW Ch. 49.52, clearly apply where an employee establishes a violation of WAC 296-128-035. The Court of Appeals erred in concluding otherwise.

Defendant's second argument is based on intervening changes to the applicable law that have no retroactive effect on Petitioners' claims. Substantive regulatory changes are prospective only when the amendment has the effect of altering the rights of a party. Review is appropriate as the Court of Appeals' decision presents an issue of continuing public interest, even in light of the agency's 2007 amendments to WAC 296-128-035. Moreover, traditional notions of substantial justice are served by granting review of the lower court's erroneous ruling.

Petitioners' request that this Court accept review, reverse the decision of the Court of Appeals, and remand this case to the trial court to permit Petitioners to proceed with their statutory wage claims against the County.

### **III. REPLY TO DEFENDANT'S ANSWER**

#### **A. Plaintiffs Have Stated an Actionable Claim Under the Respective Wage and Hour Statutes.**

Defendant first argues that the Court of Appeals correctly found that Washington law provides no statutory remedy for the delayed payment of overtime wages. The lower court's decision rested almost exclusively on its interpretation of the remedies available under the Wage Rebate Act, RCW Ch. 49.52, and gave little attention to Petitioners' remaining statutory claims under the Minimum Wage Act, RCW Ch 49.46, and the Wage Payment Act, RCW Ch. 49.48. Defendant seeks to limit review to Petitioners' claims under RCW 49.52.070, claiming that "Petitioners' Complaint does not assert any claims for unpaid wages under chapters 49.46 or 49.48." Def.'s Answer to Pet. for Review ("Answer"), at 9. Based on this narrow reading of the complaint, Defendant goes on to assert that the lower court correctly held no cause of action exists under RCW 49.52.070 based solely on an employer's failure to comply with the requirements of WAC 296-128-035.

There are two errors in Defendant's argument necessitating this Reply: First, the Complaint clearly seeks damages under not only the Wage Rebate Act, but also under the civil enforcement provisions of the Minimum Wage Act, RCW Ch. 49.46, and the Wage Payment Act, RCW Ch. 49.48. The Court of Appeals failed to adequately address either of the latter claims. Second, while Petitioners vehemently disagree that RCW

49.52.070 does not provide a basis for recovery in this instance<sup>1</sup>, Defendant cannot escape the conclusion that, even in the absence of an award of double-damages under RCW 49.52.070, the lower court erred when it found that Petitioners' have no cause of action arising under either the Minimum Wage Act or the Wage Payment Act.

**1. Petitioners' Complaint Seeks Civil Remedies Available Under the Minimum Wage Act and Wage Payment Act.**

Petitioners' Complaint alleges both a violation of Washington's Minimum Wage Act, (CP 6, ¶ 4.2), and Washington's Wage Payment Act (CP 6, ¶ 5.2). The basis for seeking civil damages under the respective statutes, in addition to the damages sought under the Wage Rebate Act, are Defendant's failure to comply with the time of payment requirements in WAC 296-128-035. (*See* CP 6, ¶¶ 4.2, 5.3). The allegations in the Complaint outlining Defendant's payroll practices and allegation violations of three different Washington statutes repudiate Defendant's claim that Petitioners' seek to recover solely for violations of RCW 49.52.070.

In Washington, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a

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<sup>1</sup> Petitioners' arguments regarding the applicability of RCW 49.52.070 are set forth in detail in Petitioners' opening brief at pages 18-20.

demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.” CR 8. The complaint “need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided.” *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977). The complaint must only contain “direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.” *Id.*

Petitioners’ Complaint satisfies the prerequisite of putting the Defendant on notice that Petitioners are seeking statutory damages arising out of the alleged violation of WAC 296-128-035. The Complaint references the civil enforcement provisions in the Minimum Wage Act, Wage Payment Act, and Wage Rebate Act. (CP 6-7). The Complaint further seeks “other relief as the Court deems just and equitable.” (CP 8). The combination of the allegations at issue, Petitioners’ references to the civil enforcement provisions in the respective statutes, and the nature of the claims under WAC 296-128-035, all establish, without doubt, that Petitioners Complaint satisfies CR 8 and constitutes a claim for civil damages under not only RCW 49.52.070, but also alternative theories of liability arising under RCW 49.46.090 and RCW 49.48.010.



Thus, while Petitioners' disagree with the Defendant that RCW 49.52.070 provides no basis for claiming damages for a violation of WAC 296-128-035, Petitioners' claims, and the Court of Appeals' dismissal of the respective claims, remain at issue on appeal.

## **2. Petitioners' Statutory Claims Were Improperly Dismissed.**

The Court of Appeals erred when it dismissed Petitioners' statutory claims arising under RCW Ch. 49.46 and RCW Ch. 49.48. The lower court gave little attention to either claim, commenting only that "[neither] chapter 49.46 RCW nor chapter 49.48 RCW provide for monetary awards when an employer has in fact paid the employees their due wages, as the County did here." A-5, at n.5 (citing *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 831, 991 P.2d 1126 (2000)). The Court held that WAC 296-128-035 "applies only to violations of minimum wage laws under chapter 49.46 RCW" and "damages under the Minimum Wage Act are limited to circumstances in which an employer fails to pay statutory *minimum wages*, which is not the case here." *Id.* (emphasis added). Defendant's Answer echoes this holding, asserting that Petitioners have failed to state a claim that Defendant failed to pay "minimum" or "final" wages "as required by chapters 49.46 and 49.48 RCW." Answer, at 3.

The statutes at issue, however, require more than simply the payment of a minimum wage or final payment at the end of employment.

The Minimum Wage Act, for instance, directs when *overtime compensation* must be paid to employees. RCW 49.46.130 (1), (2)(b). While Petitioners' have not claimed they were paid less than the minimum wage, they have alleged a failure to pay *overtime wages* as required by the Minimum Wage Act, as interpreted by the Department of Labor & Industries. (CP 6). More specifically, and as explained in Petitioners' opening brief, the Minimum Wage Act incorporates the regulatory wage-payment requirements of the Department of Labor & Industries that exist "by virtue of the [Minimum Wage Act]." RCW 49.46.090. The time-of-payment requirements in WAC 296-128-035 exist by virtue of the Minimum Wage Act. *See* RCW 49.46.040. A violation of the underlying regulation is enforceable through the civil enforcement provisions in RCW 49.46.090. Defendant's failure to pay overtime wages in the manner required under WAC 296-128-035 constitutes a violation of RCW 49.46.090. The Court of Appeals erred in finding otherwise.

The lower court's error stems, in large part, from a fundamental misreading of *SPEEA v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000). In *SPEEA*, Boeing employees who were required to attend, without pay, "pre-employment" orientation sessions, brought suit both under the Minimum Wage Act and contract law. The trial court dismissed the contract claims, but found that the pre-employment sessions constituted work under the Minimum Wage Act and entered judgment in

favor of the employees for their statutory minimum wages. Subsequently, the Court of Appeals, Division I, affirmed the trial court but held that employees were “entitled to recover the rate of pay specified in their contracts, not merely the statutory minimum wage rate.” *Id.* at 829. The issue presented to this Court was whether the employees could recover their contract rate of pay under the Minimum Wage Act.

The Supreme Court concluded that the Minimum Wage Act did not guarantee to the employees a non-overtime regular rate of pay greater than the minimum wage. In other words, the *SPEEA* plaintiffs could not use the Minimum Wage Act to enforce a contractual wage claim higher than the minimum wage. 139 Wn.2d at 831.<sup>2</sup> Nothing in *SPEEA* suggests that an employer may delay or otherwise withhold wage payments owed. *SPEEA* simply holds that when pursuing Minimum Wage Act non-overtime wage claims, employees can only recover up to the statutory minimum wage. The holding in no way limits a recovery based on a delay of *overtime* payments or even for delayed payments of non-overtime claims. *SPEEA* does not hold, as the lower court suggests, that an employee is entitled to damages only where an employer has paid no compensation to an employee.

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<sup>2</sup> The *SPEEA* court noted that the plaintiffs may have possessed a claim under the Wage Rebate Act for the wrongful withholding of wages, but that they did not pursue that claim on appeal. 139 Wn.2d at 831.

The Court of Appeals' holding that an employee is unable to bring a claim for a violation of WAC 296-128-035 through the civil enforcement provisions in RCW 49.46.090 is simply in error. Nothing in the regulation permits the Defendant to adopt the payroll-processing scheme that it has. The Court of Appeals' decision has the effect of making WAC 296-128-035 a right without any real remedy. Under the lower court's holding, an employer could delay the payment of wages – by days, by weeks, by months, or by years – without the adversely impacted employees having any statutory remedy, despite the clear mandates of the agency's rule to the contrary and despite the public policy favoring the payment of wages due to employees.

Similarly, the Court of Appeals dismissed Petitioners' claims arising under the Wage Payment Act, RCW Ch. 49.48, remarking only that the statute does not provide for a monetary award when an employer has in fact paid employees their wage. A-5, at n.5 (citing *Seattle Prof'l Egn'g*, 139 Wn.2d at 831). Payment, according to the Court, need not be in accordance with any particular time line and need not take into consideration the time-of-payment requirements under WAC 296-128-035.

The Wage Payment Act makes it unlawful to “withhold” an employees wages except in circumstances not applicable here. *See* RCW 49.48.010. The Department of Labor & Industries has been given concurrent administrative enforcement powers for claims of failure to pay

wages under the Wage Payment Act. *See* RCW 49.48.040. The agency has defined in WAC 296-128-035 what constitutes the wrongful “withholding” of wages. As detailed in WAC 296-128-035, wages are unlawfully “withheld” if the wages are not paid “at no longer than monthly intervals to each employee on established regular pay days.” WAC 296-128-035. The Defendant’s failure to comply with WAC 296-128-035 allows for a viable cause of action under the Wage Payment Act. The Court of Appeals erred when it concluded otherwise.

Petitioners’ claims arising under the Wage Rebate Act, RCW Ch. 49.52, were also dismissed by the Court of Appeals. For the reasons set forth in Petitioners’ opening brief, the lower court’s ruling as to the Wage Rebate Act claims was also in error. The plain language of WAC 296-128-035 and the requirement that an employer compensate its employees in a timely manner – a requirement that furthers Washington’s public policy of protecting employees – is given effect by permitting an aggrieved employee to use the civil enforcement provisions existing throughout the wage and hour statutes to rectify the employer’s wrongdoing.

**B. The Agency’s 2007 Amendments to WAC 296-128-035 Should Not Be Given Retroactive Effect.**

On January 27, 2007, Washington’s Department of Labor and Industries, the agency entrusted with interpreting and enforcing Washington’s wage and hour laws, promulgated a revamped version of

WAC 296-128-035. Defendant relies on the 2007 amendments to the rule when it asserts that the revisions “extinguish any continuing basis for Petitioners’ claim that the County pay practices are unlawful.” Answer, at 2. For the reasons set forth below, the 2007 amendments should not be given retroactive effect in this case. Under the rule in existence at the time of filing of Petitioners’ Complaint, the plain language of the regulation clearly established a cause of action in favor of Petitioners.

In Washington, there exists a “strong presumption that statutes and rules apply prospectively only.” *Letourneau v. State, Dept. of Licensing*, 131 Wn. App. 657, 665, 128 P.3d 647 (2006). A regulation may be given retroactive effect where its purpose is to clarify rather than change the law, *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997), however, if an amendment affects a substantive or vested right, courts will not apply the amendment retroactively to the detriment of one party. *See Letourneau*, 131 Wn. App. at 665.

The agency’s 2007 amendments, as Defendant points out, change the effect of the regulation that underlies Petitioners’ claims. Under the former version of WAC 296-128-035, an employer was required to pay employees “all wages due” at least monthly on established regular paydays. For bookkeeping purposes, an employer was permitted to withhold only those wages earned “up to seven days prior to payday.” As set forth in Petitioners’ opening brief, the Defendant’s payroll practices have the effect of unlawfully withholding wages earned more than seven

days prior to payday and delaying the payment of those wages beyond a month's time.

Applicable amendments to the regulation that impact Petitioners' substantive rights are sections (6) and (8) of the amended regulation.

Section (6) now states:

"An employer shall pay overtime wages owed to an employee on the regular pay day for the pay period in which the overtime wages were earned. If the correct amount of overtime wages cannot be determined until after such regular pay day, the employer may establish a separate pay day for overtime wages; however, the payment of overtime wages may not be delayed for a period longer than that which is reasonably necessary for the employer to compute and arrange for payment of the amount due, and overtime wages must be paid by the regular pay day following the next pay period."

WAC 296-128-035(6). New section (8) provides:

"These rules may be superseded by a collective bargaining agreement . . . if the terms of, or recognized custom and practice under, the collective bargaining agreement prescribe payment interval requirements for employees covered by the collective agreement . . . ."

WAC 296-128-035(8).

Defendant asserts that the amendments leave "no doubt" that its payroll practices are proper and lawful. Answer, at 16. This is only so if the new regulation is given retroactive effect. Under the plain language of the former regulation, the Defendant is entitled to rely on neither the exception provided in new section (6) nor the collective bargaining exception set forth in new section (8). Under the prior version of the

regulation, the agency provides no exceptions, other than the seven-day exception set forth in the rule. Under the prior version of the regulation, the version under which Petitioners brought their claims, the plain language of the regulation supports Petitioners' claim for damages. The Defendant should not be able escape liability based on an intervening change in the law that detrimentally impacts Petitioners' substantive rights.

For those reasons, the amendments to WAC 296-128-035 upon which Defendant relies on its Answer should not be given retroactive effect. This issue of whether Petitioners' may recover statutory damages for a violation of the agency's regulation remains at issue and necessitates review by this Court.




#### IV. CONCLUSION

This Court should accept review for the reasons indicated above and as set forth in Petitioners' opening brief, reverse the decision of the Court of Appeals, and remand this case to the trial court to permit Petitioners to proceed with their statutory wage claims against the County.

DATED this 21<sup>st</sup> day of February, 2007.

Respectfully submitted,

  
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No. 76953-2

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SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Trustee's Sale of the Real Property of Dorothy Ervin

Dorothy R. Ervin, *Appellant*

v.

Mortgage Electronic Registration Systems, Inc.,  
Nominee for Household Finance Corporation, *Respondent*

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RESPONDENT'S RESPONSE TO MEMORANDUM OF AMICUS CURIAE  
STANLEY I. LIPPMANN IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page No.</u>
I. Statement of Issue Addressed.....	1
II. Argument.....	1
A. It is Well-Settled that a Deed of Trust has Priority Over a Homestead Interest in Excess Proceeds.....	1
III. Conclusion.....	3

## TABLE OF AUTHORITIES

### Page No.

#### Washington Cases:

<i>In the Matter of the Trustee's Sale of the Real Property of Lawrence L. Upton,</i> 102 Wn. App. 220, 6 P.3d 1231 (2000).....	1
<i>In Re the Trustee's Sale of the Real Property of G. Michael Sweet,</i> 88 Wn. App. 199, 944 P.2d 414 (1997).....	2
<i>Wilson Sporting Goods Co. v. Pedersen,</i> 76 Wn. App. 300, 886 P.2d 203 (1994).....	2

I. STATEMENT OF ISSUE ADDRESSED.

(1) Whether this Court should accept review where Petitioner's request would result in a direct reversal of well-established case law upon which both lenders and consumers rely?

II. ARGUMENT.

A. **It is Well-Settled that a Deed of Trust has Priority Over a Homestead Interest in Excess Proceeds.**

*In In the Matter of the Trustee's Sale of the Real Property of Lawrence L. Upton*, 102 Wn. App. 220, 6 P.3d 1231 (2000), the Court stated:

The issue in this case is whether a property owner's homestead interest in the excess proceeds from a nonjudicial foreclosure sale pursuant to a first deed of trust, takes priority over the interest of the second deed of trust beneficiary in the proceeds. A deed of trust beneficiary's interest in real property is superior to an owner's homestead interest.

102 Wn. App. at 221. The *Upton* decision is directly on point. Ervin seeks nothing less than a total reversal of *Upton* and to undermine legislative intent, which is directly contrary to the notions of judicial restraint.

The Memorandum of Amicus Curiae Stanley Lippmann fails to recognize that this is a well-settled area of law and incorrectly asserts that there is a conflict between decisions. Lippmann relies on *In Re the Trustee's Sale of the Real Property of G. Michael Sweet*, 88 Wn. App. 199, 944 P.2d 414 (1997) but fails to acknowledge that the *Sweet* holding is limited to judgment liens only and that there is no actual conflict between decisions.

In fact, the *Sweet* court directly noted differences between deed of trust holders and judgment lien holders when it reasoned as follows:

The lien on excess value of homestead property is similar to a second mortgage. The second mortgage is for a certain amount, but the actual value of the lien is limited by the value of the property in excess of the first mortgage. Similarly, the lien on excess value of homestead property is for a certain amount, the amount of the judgment. The actual value of the creditor's lien, however, is limited by the value of the property in excess of the homestead exemption.

88 Wn. App. at 202 citing *Wilson Sporting Goods Co. v. Pedersen*, 76 Wn.App. 300, 886 P.2d 203 (1994).

Ervin's proposed outcome would produce a disastrous result as it would virtually eliminate the availability of second lien financing in Washington and overturn well established law which has been relied upon by mortgagors and mortgagees alike. Lippmann points to potential damage caused by nonjudicial foreclosure sales but fails to acknowledge

that the reason many homeowners are able to purchase their home in the first place (creating the homestead) is due to the availability of second liens only.

The correct remedy for Lippmann is to request legislative action on this matter; not to seek a direct reversal of well-established case law.

### III. CONCLUSION.

This is a well-settled area of law which Ervin and Amicus Curiae Lippmann are asking the Court to overrule and to ignore legislative intent in the process of doing so. The correct remedy for Ervin and Lippmann is one of legislative action.

Respectfully submitted this 26<sup>th</sup> day of February, 2007.

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Emilio M. Kosrovani, the attorney for the Appellant, 157 Yesler Way, Suite 413, Seattle, WA 98104, containing a copy of the Respondent's Response to Memorandum of Amicus Curiae Stanley I. Lippmann in Support of Petition for Review, in IN RE THE TRUSTEE'S SALE OF THE REAL PROPERTY OF DOROTHY ERVIN, Cause No. 79383-2, in the Washington State Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

/s/ Sydney E. Robinson

Sydney E. Robinson  
Done in Seattle, Washington

2/26/07

Date



Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Stan Lippmann, 2033 Sixth Avenue, Suite 920, Seattle, WA 98121, containing a copy of the Respondent's Response to Memorandum of Amicus Curiae Stanley I. Lippmann in Support of Petition for Review, in IN RE THE TRUSTEE'S SALE OF THE REAL PROPERTY OF DOROTHY ERVIN, Cause No. 79383-2, in the Washington State Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

/s/ Sydney E. Robinson

Sydney E. Robinson  
Done in Seattle, Washington

2/26/07

Date